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NOTES.

THE RIGHTS OF THE HEIR OF A DECEASED PARTNER IN FIRM REALTY.—It is fundamental that no partner has title to any specific personalty, his interest therein being merely an equity to share in the final residual proceeds. *Bank* v. *Carrollton R. R.* (1870) 11 Wall 624. The legal title to the firm realty, on the other hand, because of technical rules of seisin, *Percifull* v. *Platt* (1880) 36 Ark. 456, must vest in some member (or members); but Equity treats the holder as trustee, *Dupuy* v. *Leavenworth* (1861) 17 Cal. 263, without beneficial rights in any particular parcel. *Meily* v. *Wood* (1872) 71 Pa. 488. In England an intention that all assets shall be turned into cash upon dissolution is presumed. *Darby* v. *Darby* (1856) 3 Drew. 495. Accordingly, through the doctrine of conversion the realty when acquired is regarded in Equity as personalty, both as between the partners, cf. *Essex* v. *Essex* (1855) 20 Beav. 442, thereby excluding dower, cf. *In re Music Hall Block* (1885) 8 Ont. Rep. 225, and as between the real and personal representatives of a deceased partner,

Attorney-General v. *Hubbuck* (1884) 13 Q. B. Div. 275, unless a contrary intention appears. *In re Wilson* (1893) 2 Ch. 340 (semble); Partn. Act (1890) § 22. In America this presumption of intention is rejected, *Shearer* v. *Shearer* (1867) 98 Mass. 107, and a specific division of the realty may be decreed. *Molineaux* v. *Reynolds* (1896) 54 N. J. Eq. 559. The English result is here reached only under special circumstances: e. g., where there are express provisions for sale, *Maddock* v. *Astbury* (1880) 32 N. J. Eq. 181, or when the sole partnership object is land speculation. *Buckley* v. *Doig* (1907) 188 N. Y. 238. But except in such cases almost no American jurisdiction bars the heir altogether. His exact status, however, is involved in confusion. Much of this obscurity is due to needless use of the language of conversion. It is commonly stated that the realty is converted into personalty so far as necessary to satisfy firm creditors and to adjust advances by partners. *Rovelsky* v. *Brown* (1890) 92 Ala. 522, 525. But the realty is liable not because it is regarded as personalty, but because it is firm property. Parsons, Princ. Partn. (2nd Ed.) § 114. The cases in group 2, *post*, might be explained simply on the theory of implied trusts. *Shearer* v. *Shearer*, *supra*. Strictly, conversion can only concern those whose rights are affected by the legal nature of the property, i. e., a deceased partner's representatives and widow. Lindley, Partn. (7th Ed.) 383; see *Woodward-Holmes Co.* v. *Nudd* (1894) 58 Minn. 236. The numerous cases establish clearly but two results, though without adequate development of the reasons: first, any surplus of realty *in specie* after adjustment of firm obligations goes to the heir, *Foster's Appeal* (1873) 74 Pa. 391; *Buchan* v. *Sumner* (N. Y. 1847) 2 Barb. Ch. 165, 201, subject to dower; *Lenow* v. *Fones* (1886) 48 Ark. 557; second, if the realty must be sold to meet firm obligations, Equity will compel the heir to convey whatever legal title vested in him. *Burnside* v. *Merrick* (Mass. 1842) 4 Met. 537; *Shanks* v. *Klein* (1881) 104 U. S. 18. The precise nature of the heir's rights between the ancestor's death and the distribution point is left undetermined.

Since a partner's share is strictly a right merely in the ultimate balance of the firm property, whatever its form, cf. *Clagett* v. *Kilbourne* (U. S. 1861) 1 Black. 346, the moment determinative of the shares of living partners is the distribution point. Dissolution of the firm by the death of a member introduces the derivative, conflicting rights of either class of the decedent's representatives, and also a second controlling point of time, the instant of death. The English doctrine meets this situation logically, for at the partner's death the right ordinarily is a right to cash on final accounting, Lindley, Partn. (7th Ed.) 377, or, if a contrary intention appears, a right in realty then owned. If the American doctrine differed from the English only in that the presumption of intention was reversed, it would be equally logical. Dicta to the effect that the surviving partner must exhaust the personalty in payment of debts before recourse to the realty, *Stroud* v. *Stroud* (N. C. 1868) Phil. L. R. 525, 526; *Easton* v. *Courtwright* (1884) 84 Mo. 27, 39, *Walling* v. *Burgess* (1889) 122 Ind. 299, 305, and decisions giving the heir the surplus proceeds of the necessary sale of indivisible realty, *Walling* v. *Burgess*, *supra*, seem to indicate that the heir's rights are in this country also fixed as of the

date of the partner's death, though not ascertained until the distribution point. But the *in specie* rule, group 1, *supra,* is either non-committal, because enunciated where the realty was owned during the life of the firm, *Haeberley's Appeal* (1899) 191 Pa. 239, or it determines the heir's rights by the fortuitous condition of assets at the distribution point, as where personalty is exchanged for realty by the surviving partner during the winding-up process. *Coolidge* v. *Burke* (1901) 69 Ark. 237. It is submitted that the measure of the heir's rights should be the land existing *in specie* at the time of the partner's death, or if sold, the proceeds remaining after payment of firm debts, plus the value of personalty which might properly have been used. This rule logically fixes the heir's rights as of the date of the ancestor's death, without necessarily negativing power in the surviving partner to sell the land, though the personal assets exceed liabilities. It might be argued that such power should exist in certain cases, as where a sale of realty would serve to swell the totality of assets, or an immediate liquidation of personalty would be ruinous, see *Rossum* v. *Sinker* (Ind. 1880) 12 Cent. L. J. 202, inasmuch as a partnership is primarily an association for profit. That the courts would go so far is doubtful, and it would seem that such sales should be at least on order of court. Support for the main rule suggested is found in dower cases. A widow has dower in the land left over *in specie, supra,* or if this be sold, to an equivalent in the surplus proceeds. *Mowry* v. *Bradley* (1876) 11 R. I. 370. Though these cases are authoritative, they present a difficulty not found in the inheritance cases. The accepted doctrine of firm title, Burdick, Partn. (2nd Ed.) 98, 146, 148, precludes any conception of individual beneficial seisin like that of an ordinary land owner. But since the firm is not an entity, Burdick, *supra,* 81, it is evident that the beneficial seisin must rest in the partners in some individual capacity. Whatever the nature of this seisin, it is clearly not the orthodox seisin necessary to sustain dower, nor is it that of tenants in common, as often intimated. *Dyer* v. *Clark* (Mass. 1843) 5 Met. 562, 577; *Pepper* v. *Smith* (1887) 24 Ill. App. 316. See Burdick, *supra,* 101, *et seq.*

None of these difficulties is relieved by a recent decision in Arkansas. On A's death, his co-partners, B and C, bought in the partnership plant at a sale ordered on their *ex parte* petition. Before the confirmation of the sale A's administrator acquiesced in the irregularity of such a purchase by surviving partners. Later A's heirs claimed that as a portion of the property was realty they should have been served. It was held that they were not parties in interest. *French* v. *Vanatta* (Ark. 1907) 104 S. W. 141. This result would, of course, be reached in England. *Supra.* If the sale had been to a third party and the personalty had been insufficient to meet firm obligations, the decision would be sustained by the American cases generally. Under the rule earlier submitted the decision on its actual facts is plainly wrong. As the heir's rights had attached at the time of A's death to the realty attempted to be sold by A's administrator, it follows that these rights could not be barred by any act of the personal representative. That such a sale, *bona fide,* leaves the distributees remediless except against the administrator, is settled, *Kimball* v. *Lin-*

coln (1881) 99 Ill. 578, but there is no clear authority for the statement of a text-writer that the heir is similarly limited. Bates, Partn. § 924. In *Valentine* v. *Wysor* (1889) 123 Ind. 47, the "heirs" were devisees and the will conferred power of sale, and in *Steinberg* v. *Larkin* (1897) 58 Kan. 201, the heirs were parties to the sale proceedings. The reasoning in the principal case was clearly anomalous. The argument was that the sale itself worked the conversion into personalty, so that when the administrator acquiesced, he was competent to represent the whole estate. If the sale worked the conversion, it does not appear how the administrator's acquiescence could affect the heir as of the time of the order of sale, when some of the property was still realty. The confusion in the law of partnership realty may well have contributed to the adoption in the proposed American Partnership Act, § 1 Reports, Amer. Bar Ass'n, 1906, Pt. 2, 440, of the mercantile view of the firm as a legal entity. Under this theory the heir has no rights and the widow, no dower. Act, § 22.

EQUITABLE JURISDICTION OF UNILATERAL ERROR OF LAW.—It has been stated that the jurisdiction of Chancery to relieve from error of law is "a recognized and highly beneficial branch of remedial justice." Story, Eq. Jur., 12th ed., Redfield's note, § 138a, *et seq.;* id. 13th ed., Bigelow's note, 112 *et seq.* That logically and as a matter of policy such relief should be granted, 7 COLUMBIA LAW REVIEW 279, is neither reason nor excuse for a misstatement of the present status of the law. Eight criteria of relief from unilateral error (to which this discussion is confined) have been advanced. The theory of Lord Westbury that *ignorantia juris non excusat* has reference only to general law as distinguished from private right and interest, *Cooper* v. *Phibbs* (1867) L. R. 2 Eng. & Ir. App. 149, apart from an obvious difficulty of application, is supported only by dicta. In a quite different sense, the suggestion has a proper use, special as distinguished from general legislative acts being without the operation of the maxim. *King* v. *Doolittle* (Tenn. 1858) 1 Head 77. Lord King's attempt to relegate the rule to criminal jurisprudence solely, *Lansdown* v. *Lansdown* (1730) Mos. 364; *Wyche* v. *Greene* (1854) 16 Ga. 49, 57, is likewise irreconcilable with authority. *Rankin* v. *Mortimer* (Pa. 1838) 7 Watts 372; *Goltra* v. *Sanasack* (1870) 53 Ill. 456. A mistake concerning an unquestioned, unequivocal legal rule has been held relievable; otherwise where the mistake concerns a doubtful or unsettled rule. Snell, Equity, 371. Whether true or not where compromises are concerned, *Naylor* v. *Winch* (1824) 1 Sim. & Stu. 555; cf. *Faust's Adm'x* v. *Birner* (1860) 30 Mo. 414, so far is this test from being universal that some jurisdictions hold exactly the reverse, giving relief "where the law is confessedly doubtful and * * * ignorance may well exist." *McKay* v. *Smith* (1902) 27 Wash. 442; Bispham, Eq., 5th ed., 275. Neither distinction seems theoretically intelligible or of practical expediency. *Good* v. *Herr* (Pa. 1844) 7 W. & S. 253. Where relief seems given for error of settled law, *Lansdown* v. *Lansdown, supra,* the error is not *per se* the foundation of jurisdiction but rather a medium to establish some other proper ground of relief. *Hunt* v. *Rousmanier's Admin'rs* (1828) 1 Pet. 1, 15, 16. Adopting a dictum that "ignorance is not mistake," *Fletcher* v